

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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:  
IN RE: APPLICATION OF CITY :  
OF ALMATY FOR ORDER TO TAKE : 16-MC-623 (WFK) (JO)  
DISCOVERY PURSUANT TO :  
28 U.S.C 1782 : January 13, 2017  
:  
: Brooklyn, New York  
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TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT  
BEFORE THE HONORABLE JAMES ORENSTEIN  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: ROBERT MALIONEK, ESQ.

For the Defendant: JOHN KENNEY, ESQ.  
JOHN CURLEY, ESQ.

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1           THE CLERK: Civil cause for status  
2 conference, docket number 16-MC-623, In Re:  
3 Application of the City of Almaty.

4           Will the parties please state your  
5 appearances for the record?

6           MR. MALIONEK: Robert MalioneK or Latham &  
7 Watkins for the City of Almaty.

8           THE COURT: Good morning.

9           MR. MALIONEK: Good morning.

10          MR. KENNEY: John Kenney and John Curley  
11 with Hoguet Newman Regal & Kenney for the RMP  
12 partnerships.

13          THE COURT: Good morning. Before we get to  
14 the issue of fees, I just want to confirm that the  
15 discovery that was ordered has been provided.

16          MR. MALIONEK: The discovery that was  
17 ordered was for our 1782 application to go forward.  
18 Documents have been produced. We do intend to serve a  
19 notice of deposition. That was part of the original  
20 application that was granted.

21          THE COURT: Right.

22          MR. MALIONEK: So we'll be asking for the  
23 PMK depositions, we assume, of Elvira Krapanoff (ph)  
24 and others but we'll be serving that soon. We're just  
25 in the process of reviewing the documents first. Thank

1 you.

2 THE COURT: All right. I take it there's no  
3 dispute about the deposition going forward?

4 MR. KENNEY: Not at the moment. We don't  
5 expect one.

6 THE COURT: Very good. If anything comes up  
7 in that regard, of course you'll let me know. Let's  
8 get to the issue of fees.

9 Mr. Malioneck, I've read the papers and I may  
10 have some questions but if you want to add anything to  
11 your submission, I'll hear you.

12 MR. MALIONEK: I think, your Honor, I'll try  
13 to be brief then. As you know, and we've never  
14 actually had the opportunity to brief the background of  
15 the case, but the City of Almaty is an interested party  
16 pursuant to the criminal proceedings against the  
17 Krapanoff family. Victor Krapanoff was the mayor of  
18 Almaty and his family have been accused -- warrants  
19 have been issued for the arrest of members of his  
20 family. They were running a criminal enterprise and  
21 had stolen and then laundered perhaps 300 million  
22 dollars of funds through real estate, through U.S.  
23 banks. The 1782 application that we filed was our  
24 effort on behalf of the city to try to locate the funds  
25 that were laundered, we understand, through the RPM

1 entities that are the defendants in this action.

2           We filed the application in March. It was  
3 granted right away. Then the motion to vacate had been  
4 filed. It was briefed and submitted in June and then  
5 in October, as you know, your Honor, a hearing was --  
6 the parties were asked for dates to appear for a  
7 hearing on the 1782 application. We understood at that  
8 point that RPM's prior counsel was going to seek to  
9 withdraw and then Mr. Kenney was planning to substitute  
10 in. We understand that RPM, from the motion to  
11 withdraw, was not paying over \$100,000 in RPM's fees.

12           At the status conference on November 17<sup>th</sup> --  
13 that was three weeks later -- we prepared our  
14 presentation with respect to all issues in the case,  
15 including as necessary on the motion to vacate with  
16 respect to the 1782. Your order was for a principal or  
17 officer of each of the RPM entities to attend. Of  
18 course, we prepared and they failed to appear. You  
19 issued a status conference for the next day with the  
20 same instructions. Again, we prepared and they failed  
21 to appear.

22           At that point, Mr. Kenney substituted in and  
23 they withdrew their motion to vacate without giving us  
24 prior notice other than the evening before that  
25 November 18<sup>th</sup> status conference. You recognized, your

1 Honor, that we were free to seek sanctions with respect  
2 to the costs incurred in the -- as caused by the  
3 failure of the principals or officers to appear as well  
4 as with respect to the litigation burdens in opposing  
5 what ultimately became an abandoned motion.

6 The standard under Rule 16(f) states that  
7 the Court must order a disobeying party, a party who  
8 fails to appear, to pay the reasonable costs including  
9 attorneys' fees. The burden is on the disobeying party  
10 to show that a sanction would be unjust or the conduct  
11 was substantially justified. We think that the  
12 defendants can't meet their burden here.

13 With respect to the conferences, the  
14 defendants' principals or officers failed to attend two  
15 consecutive status conferences, forcing the City of  
16 Almaty to incur costs related to the prep and travel,  
17 without any substantial justification. Defendants  
18 argue in their response papers that they understood the  
19 principals were not required to attend, but the Court's  
20 orders were unambiguous with respect to that. We think  
21 they could not have been more clear.

22 The letter that was submitted by Elvira  
23 Krapanoff, who is the principal for RPM-Marco,  
24 acknowledged knowing about the orders and even that  
25 their prior counsel had instructed her three weeks

1 before the hearing that failing to appear wouldn't be  
2 acceptable, in all likelihood. No explanation has ever  
3 been provided by RPM U.S.A. for their failure to appear  
4 and under the rule, the sanctions include all expenses  
5 incurred because of the noncompliance, so everything  
6 flowing from the sanctionable conduct. Here, they're  
7 abandoning their motion without prior notice, forcing  
8 us to prepare, as well as their failure to appear at  
9 the status conferences.

10 As to the briefing, the defendants wasted  
11 the Court's time, the City of Almaty's time in  
12 litigating and preparing for a motion to vacate,  
13 including at those November status conferences that was  
14 ultimately simply abandoned. Their only explanation  
15 for doing this is that there was a ruling that came out  
16 in June in an unrelated case that the City of Almaty is  
17 not involved in. And after that ruling came out on a  
18 joinder issue, it no longer made sense, they say, to  
19 resist the subpoenas. That was in June.

20 They failed to explain why they neglected to  
21 tell the Court or the City of Almaty for five months  
22 that they were then planning on withdrawing their  
23 motion to vacate. They didn't say that they were  
24 planning to do so when the Court asked the parties to  
25 schedule a hearing. They didn't say they were planning

1 to do so when the Court scheduled the November status  
2 conferences. They didn't even say anything at the  
3 November 17<sup>th</sup> hearing, which forced the City of Almaty  
4 to incur additional costs related to the preparation.  
5 We think that for all of those reasons, they don't meet  
6 their burden of showing that an award under these  
7 circumstances would be unjust.

8           The second issue that the defendants take up  
9 in their papers is that the City of Almaty's fees and  
10 costs are unreasonable here. The fees and costs that  
11 we seek are less than \$100,000, \$89,000 in fact. The  
12 standard of the Second Circuit is, what would a  
13 reasonable client be willing to pay to prosecute this  
14 particular case? Here, there's no better evidence, we  
15 think, than what the defendants' own counsel's fees  
16 have been for just a portion of what the city is  
17 seeking in this case.

18           Prior counsel stated in their motion to  
19 withdraw that it was owed over \$100,000. That did not  
20 include the amount that they had already subtracted  
21 because of the retainer. It did not include the  
22 preparation and the attendance at the status  
23 conferences. It did not include any costs related to  
24 preparing this motion, this application seeking our  
25 costs.

1           It's also clear under the Second Circuit's  
2 precedent that a Rule 16 sanction and the sanctions  
3 that are allowed under this Court's inherent authority  
4 also can be used as penalties or as a deterrent. Under  
5 the Mahoney case, for example, the Court can take into  
6 account the financial situation of the disobeying  
7 parties and found that it's reasonable and particular  
8 to take into account the amount that they themselves  
9 spent for their own counsel's defense in a case.

10           Here, keep in mind please that the  
11 defendants are accused of participating in money  
12 laundering of hundreds of millions of dollars of the  
13 city's funds. We have started to see evidence of the  
14 documents that we've started to review.

15           THE COURT: One moment. Go ahead.

16           MR. MALIONEK: The cases that the defendants  
17 cite we think are all with respect to inapposite  
18 circumstances. They cite cases, for example, where  
19 sanction awards were reduced or attorneys' fees were  
20 reduced because the party seeking the sanctions made no  
21 effort to provide what the professional qualifications  
22 were of the attorneys that were involved. They cite to  
23 cases with respect to block billing, in which the court  
24 was unable to determine what amounts within a block  
25 bill were related to the sanctionable conduct, whereas



1 here, we've already deducted and redacted out anything  
2 that is unrelated to just those fees for which we seek  
3 the sanctions.

4 Here, we also already deducted some of the  
5 City of Almaty's costs, including -- we've deducted Mr.  
6 Schindler's return trip back to L.A. by half. We  
7 haven't asked for any sanctions related to the  
8 preparation time for the November conferences that were  
9 incurred by the associates who are involved in the  
10 case. We've excluded any of the fees related to  
11 preparation for this hearing. So think for all of  
12 those reasons, a sanction is appropriate and the fees  
13 that the city are seeking and costs are reasonable.  
14 Thank you.

15 MR. KENNEY: Thank you, your Honor. I'll  
16 try to be brief. I realize that you've read the  
17 papers. I do have to mention a couple of things in  
18 light of the argument that was just made. Let me start  
19 with RPM's partnerships.

20 I'm not sure that the Court is aware that  
21 these are both limited partnerships and they're  
22 designed -- and it's a fairly commonly design for banks  
23 and investment individuals and partnerships investing  
24 in other countries from the U.S. to another country,  
25 another country to her, and that's what these are.

1 They were designed to receive money from abroad and to  
2 invest in certain entities. The Moro one was for the  
3 benefit of the daughter of the Krapanoff family, who  
4 you've heard about and lives in California, has a  
5 family there and a small business and three children.  
6 None of these entitles have any staff or have done any  
7 activity in the last -- I think since 2014. So that's  
8 the status.

9 As to Kazakhstan, what's being left out is  
10 that Kazakhstan is run by a dictator who runs all three  
11 branches of government. Our client and other members  
12 of his family are political dissidents. The father,  
13 Victor Krapanoff, has requested political asylum in  
14 Switzerland. The Kazakhstan government, through Almaty  
15 and other entities, have brought lawsuits against this  
16 family in Los Angeles, in the Southern District of New  
17 York, with a RICO which was -- the RICO parts were just  
18 dismissed. The Los Angeles case was dismissed and is  
19 on appeal.

20 The Latham firm is handling the Los Angeles  
21 case. The Boyz (ph) firm is handling the case here.  
22 That dismissal is -- they're requesting a certification  
23 to appeal. Cases have been brought in Great Britain,  
24 Switzerland. There are criminal investigations that  
25 have been started in various places. So what we have

1 is a political battle. The case in the Southern  
2 District was dismissed because the RICO counts --

3 THE COURT: I'm sorry to interrupt, sir, but  
4 there's no political battle in this Court. It's simply  
5 a matter of -- it's a very narrow issue and I have no  
6 intention of weighing in on who's right or wrong as  
7 between the various litigants on any of the merits  
8 here. It's just a matter of --

9 MR. KENNEY: I was just responding --

10 THE COURT: Yes, and I'm not taking into  
11 account anything about the backdrop, particularly the  
12 political backdrop.

13 MR. KENNEY: So far --

14 THE COURT: You can address the motion  
15 that's before me, though.

16 MR. KENNEY: So far as I know, your Honor,  
17 only partly in the motion that (ui) responded to has  
18 there been any response to that, and I just didn't want  
19 to leave that on the record without any response.

20 THE COURT: I'll tell you what. Anything  
21 that you want to say about the political aspects of  
22 this, feel free to expand the record by submitting your  
23 political views --

24 MR. KENNEY: Sure.

25 THE COURT: -- on behalf of your client in a

1 separate mailing, okay? But let's address the motion  
2 here.

3 MR. KENNEY: I will do that, your Honor. So  
4 let me address Elvira Krapanoff. She uses her married  
5 name, as you know from the letter that you received,  
6 but we'll call her Krapanoff because it will show the  
7 connection more easily.

8 The proceeding here is a request for  
9 interrogatories which was ex parte and granted, as your  
10 Honor knows. The hearing that we're talking about was  
11 not, as we understood it, a hearing for oral argument.  
12 It was a status conference and it was ordered by the  
13 Court on the same day, October 27<sup>th</sup>, that the Morville  
14 firm indicated it wished to withdraw. We appeared on  
15 the 17<sup>th</sup>, frankly as a courtesy to the Court and to let  
16 you know we would represent them but we hadn't been  
17 retained at that time, so we filed our notice of  
18 appearance the following day, on the 18<sup>th</sup>.

19 The Court may impose sanctions for failure  
20 to appear provided there's not a reason why -- the  
21 Court isn't required to impose sanctions. We will  
22 argue in a minute that the only sanctions or fees that  
23 should be imposed are for the second day of the  
24 hearing. I'm going to put that aside just for a  
25 minute.

1           In terms of Elvira Krapanoff's conduct, she  
2 did know that you had issued an order on the 27<sup>th</sup> that  
3 she was to appear. The circumstances are -- I think  
4 this is important for the Court to take into  
5 consideration. Her counsel that had been representing  
6 her had filed a request to withdraw. Her new counsel,  
7 which she -- we had spoken with her and she knew we  
8 were available but had not yet been retained and had  
9 not yet filed a notice of appearance. In effect, she  
10 didn't have any counsel. She did have counsel --

11           THE COURT: I'm sorry, I cannot agree with  
12 that and I'm sure you know that that's not true. She  
13 had --

14           MR. KENNEY: Well --

15           THE COURT: Excuse me, sir.

16           MR. KENNEY: Yeah.

17           THE COURT: She had counsel of record who  
18 was seeking to withdraw.

19           MR. KENNEY: Yes.

20           THE COURT: As I did then and as I always do  
21 in such circumstances, I required counsel and client  
22 together to appear so that I can discuss the motion  
23 with them. She was not without counsel.

24           MR. KENNEY: The point that I'm making is  
25 not that she's not without counsel. She had at least

1 some inability to get the legal advice that she needed,  
2 and she went to another lawyer who represented her in  
3 the Los Angeles case --

4 THE COURT: Look, of all the aspects of the  
5 motion before me --

6 MR. KENNEY: Yes.

7 THE COURT: -- the idea that your client had  
8 an excuse for not appearing as directed at that first  
9 conference is I think the least likely to persuade me.  
10 So I encourage you to move on to other aspects but I  
11 will of course hear you out.

12 MR. KENNEY: Well, I'll be brief. The point  
13 that I want to make is, she did go to counsel in Los  
14 Angeles. The counsel in Los Angeles did send an email  
15 to Morville's firm seeking to have her appear by  
16 telephone. She says that in the letter of the 17<sup>th</sup> and  
17 that should go to some weight at least, not as an  
18 excuse -- she says in here letter, I apologize but I  
19 didn't intend to do this. I thought because lawyers  
20 were going to appear, that there was no issue and I  
21 would not have to appear.

22 THE COURT: But I can't imagine that any  
23 lawyer, yourself or anyone else, would have told a  
24 client or potential client, you can assume you don't  
25 need to follow this order, even without hearing from

1 the Court. Every responsible lawyer in that  
2 circumstance would say, look, I'm going to do my best  
3 to get you out of this but you've got an order and  
4 until we get an order vacated, you need to comply.  
5 That would have been your advice, certainly.

6 MR. KENNEY: I don't disagree with you but I  
7 am a lawyer. I know what my advice would be.

8 THE COURT: Right. Look, either she was  
9 getting advice from lawyers or she wasn't. If she  
10 wasn't, she just had an order and she had to comply.  
11 If she was, I know what the advice must have been or  
12 should have been. But in any event, she had an  
13 obligation. I do request, most respectfully, that you  
14 move on to something else because --

15 MR. KENNEY: I'm happy to.

16 THE COURT: At best, we're going to disagree  
17 on this one.

18 MR. KENNEY: Yes. So I've made my point.

19 THE COURT: Yes.

20 MR. KENNEY: And I fully understand your  
21 Honor, so we'll turn to costs. The order that your  
22 Honor issued was to have a status conference. The  
23 order was not to have oral argument on an outstanding  
24 motion. We understood when we read the papers  
25 afterwards that your Honor wanted to have counsel and

1 wanted to make sure that if you granted the motion to  
2 withdrawn, that there would be other counsel and the  
3 case would move forward. That's why we showed up in  
4 the courtroom.

5           The only expense that the Latham firm went  
6 to was to come back the second day, which we agree and  
7 we've told them, we'd be happy to see your costs on  
8 that and pay for that. We don't think we should be  
9 paying for and we don't think there's any connection  
10 between the failure to appear and the briefing of that  
11 motion. The motion had been presumably mostly briefed  
12 prior to the time -- the motion was fully briefed on  
13 the 2<sup>nd</sup> of June and we don't understand why somebody  
14 would go to great lengths to get the motion ready when  
15 they were appearing for a status conference and it  
16 wasn't clear who the counsel was going to be on the  
17 other side. That's why we don't think that our client  
18 should be -- that those costs should be imposed on it.

19           What they have is, they want \$90,000,  
20 essentially, a few dollars less than that. That's  
21 \$56,000. \$20,000 also is in preparation for that  
22 motion, which wasn't scheduled for oral argument so far  
23 as we know. Certainly, we looked at the order to see  
24 if we had substituted, if we'd have to be ready to  
25 argue the motion.



1 THE COURT: None of it would have been  
2 required -- there wouldn't have been a penny of these  
3 costs that are at issue now if your client hadn't made  
4 the motion to vacate, right?

5 MR. KENNEY: Sure.

6 THE COURT: Okay. And I take it as a legal  
7 proposition, you agree that if that motion was made for  
8 purposes of delay and harassment, the fees can be  
9 awarded, correct?

10 MR. KENNEY: Yes, if there was a basis to  
11 make such a finding.

12 THE COURT: Okay, so that's really the  
13 issue. You're saying that the motion to vacate was  
14 made in good faith and that as of mid-June -- I forget  
15 the exact date --

16 MR. KENNEY: Right.

17 THE COURT: -- based on Judge Nathan's order  
18 in a case, in which none of the parties here is a  
19 party, is that correct?

20 MR. KENNEY: No. Almaty is the plaintiff.

21 THE COURT: In the Judge Nathan case.

22 MR. KENNEY: In the Judge Nathan case.

23 THE COURT: Okay.

24 MR. KENNEY: And Victor and Ilius (ph)  
25 Krapanoff are defendants, the father and brother.

1 THE COURT: Okay.

2 MR. KENNEY: But not (ui).

3 THE COURT: You're saying as a result of the  
4 ruling in that case, your clients, who are not parties  
5 there, decided that they would no longer resist  
6 discovery in this case.

7 MR. KENNEY: No.

8 THE COURT: No, okay. I misunderstood your  
9 position then.

10 MR. KENNEY: What we're saying is, in part,  
11 that's true.

12 THE COURT: So it is true.

13 MR. KENNEY: No. That's a piece of the  
14 judgment. That's a piece of the judgment.

15 THE COURT: But that piece of it is correct,  
16 that they were resisting before.

17 MR. KENNEY: Yes.

18 THE COURT: In good faith.

19 MR. KENNEY: Yes.

20 THE COURT: And that as a result of Judge  
21 Nathan's decision, they decided not to resist.

22 MR. KENNEY: As a result of Judge Nathan's  
23 decision joining them in that case --

24 THE COURT: Yes.

25 MR. KENNEY: -- they decided that since that

1 allowed third party subpoenas, for which there wouldn't  
2 be the same basis to oppose as the motion to vacate, we  
3 should consider that among other things as to whether  
4 we wanted to go ahead with the motion to vacate.

5 THE COURT: When was the decision made to no  
6 longer resist?

7 MR. KENNEY: The decision to no longer  
8 resist was discussed at great length --

9 THE COURT: When was it made, sir?

10 MR. KENNEY: It was made on the 17<sup>th</sup> or 18<sup>th</sup>.

11 THE COURT: Of?

12 MR. KENNEY: Of November. I'd like to --

13 THE COURT: I'm going to ask you to pause  
14 for a moment.

15 MR. KENNEY: Sure.

16 THE COURT: I want to take a look at your  
17 document.

18 (Pause in proceedings.)

19 THE COURT: Page 2 of your letter of  
20 December 29<sup>th</sup>, at the end of the third paragraph under  
21 section heading number 2.

22 MR. KENNEY: Yes.

23 THE COURT: "After the RPM entities moved to  
24 quash here, Judge Nathan granted a joinder motion on  
25 June 21<sup>st</sup>, 2016 that expended the scope of the Southern

1 District action and made third party discovery toward  
2 the RPM entities more likely."

3 MR. KENNEY: Yes.

4 THE COURT: "At that point, it no longer  
5 made sense to resist the subpoenas."

6 MR. KENNEY: Yes.

7 THE COURT: But you're saying, having  
8 determined that at that point, it no longer made sense  
9 to resist, the decision to actually stop resisting was  
10 not made until November.

11 MR. KENNEY: Yes. Well, let me make clear  
12 we didn't --

13 THE COURT: So your client persisted --

14 MR. KENNEY: Wait just a second.

15 THE COURT: -- in pressing a motion that no  
16 longer made sense for them for those five months?

17 MR. KENNEY: Well, there are a number of  
18 pieces missing there. We didn't represent this client  
19 until November 18<sup>th</sup>, so we talked to them and we and  
20 then made the decision. We knew about --

21 THE COURT: I'm sorry, Mr. Kenney, but this  
22 is somewhat frustrating because it seems to be moving  
23 the goalpost in terms of what your client is asserting  
24 as just not a reason but as to what happened.

25 MR. KENNEY: Let me --

1           THE COURT: And I can't resolve, I don't  
2 think, these factual issues at this point about who  
3 made the decision and when and on what basis without  
4 factually getting evidence from the clients and the  
5 attorneys who advised. I don't want to intrude on the  
6 privilege but if you're saying that it no longer made  
7 sense to resist as of June 21<sup>st</sup> but the decision to stop  
8 resisting wasn't made until November 17<sup>th</sup>, I have a lot  
9 of questions that need to be answered and among them  
10 are facts -- the absence of any indication that they  
11 would no longer resist discovery, the fact that they  
12 didn't provide the discovery in the intervening months,  
13 statements in the motion to withdraw that are wholly  
14 inconsistent with a belief that resisting the subpoena  
15 no longer made sense. Frankly, I have some real  
16 reservations about the veracity of the assertion.

17           MR. KENNEY: Let me make a proffer if I may.

18           THE COURT: And I need to resolve those  
19 before I can give some credit to the position you're  
20 taking.

21           MR. KENNEY: May I make a proffer?

22           THE COURT: You've already done so but go  
23 ahead, make some more proffers.

24           MR. KENNEY: I'm arguing but now I'm saying  
25 if you have a hearing, this is what you'll find out.

1 THE COURT: Yeah.

2 MR. KENNEY: We did not get in this case and  
3 make decisions with the client until the 17<sup>th</sup> and 18<sup>th</sup>  
4 of November. We are the law firm that made the  
5 decision not to go forward with the motion. There were  
6 a number of reasons that I can tell you because I was  
7 there and I had the phone calls, but I didn't have any  
8 authority and I didn't represent this client in this  
9 case between June and November, so I wasn't  
10 participating at that time and I don't know what they  
11 thought.

12 I'm telling you what I thought, and what I  
13 thought was, you have this other case where they can  
14 get the same stuff now. They haven't yet, maybe they  
15 wouldn't. It's costing \$100,000. We're the second  
16 firm to come into this case. Obviously, we don't want  
17 to continue along this range. Any decision made by the  
18 Court in this case was almost certainly going to be  
19 appealed no matter how it came out.

20 We looked at the documents or waked through  
21 the thing. We decided it was more practical to  
22 withdraw the motion and produce the documents and have  
23 the deposition than it was to go forward. We had this  
24 discussion with our client. The client agreed and  
25 that's why we suggested withdrawing the motion. We

1 asked the Latham firm if they would consent. They  
2 refused to consent so we came in and asked the Court if  
3 we could make a motion to withdraw. It had nothing to  
4 do with what sanctions the Court might impose.

5 THE COURT: Why didn't I hear about that in  
6 the first communication from your client saying, sorry,  
7 I can't be there?

8 MR. KENNEY: I don't recall but I think the  
9 answer to that is, we hadn't fully made that decision.

10 THE COURT: But you're telling me that  
11 that's the date the decision was made.

12 MR. KENNEY: Either the 17<sup>th</sup> or 18<sup>th</sup>.

13 THE COURT: I see. It's disturbingly  
14 malleable, Mr. Kenney.

15 MR. KENNEY: We were discussing it, Judge.

16 THE COURT: I see.

17 MR. KENNEY: And then when we came in on the  
18 18<sup>th</sup>, we had decided that --

19 THE COURT: And no hint of that in the  
20 letter of November 17<sup>th</sup> from your client.

21 MR. KENNEY: I wouldn't expect there would  
22 be.

23 THE COURT: No. All right, well --

24 MR. KENNEY: I don't think she's going to be  
25 saying, we're thinking about withdrawing the motion.

1 She's our client.

2 THE COURT: As far as you know -- do you  
3 know one way or the other if your client had any such  
4 discussions with prior counsel?

5 MR. KENNEY: I don't know.

6 THE COURT: This is frankly, Mr. Kenney,  
7 very troubling.

8 MR. KENNEY: I'm more than happy to answer  
9 any questions the judge might have in mind to put you  
10 at ease, if I can.

11 THE COURT: My questions are about when this  
12 decision was purportedly made.

13 MR. KENNEY: Right.

14 THE COURT: Because the way it looks to me  
15 right now, the only thing that seems to be consistent  
16 with the objective facts on the record in terms of what  
17 was said by whom and when is that the statement that we  
18 decided only on November 17<sup>th</sup> to withdraw the motion is  
19 less plausible than the proposition that the motion to  
20 vacate was made for purposes of delay and harassment,  
21 because had the motion been deemed unwise or futile in  
22 June, I would expect for any number of reasons the  
23 docket to look very different than it does. The  
24 questions I would want to ask are questions that need  
25 to be posed to your client, to former counsel, to



1 yourself under oath. We can have that here and if  
2 necessary to resolve this issue, we will.

3 MR. KENNEY: All I can tell your Honor is, I  
4 was not representing the client before the 17<sup>th</sup> of  
5 November, so I don't know what they were thinking or  
6 their lawyers were thinking. I wasn't a participant in  
7 that.

8 THE COURT: Of course you weren't a  
9 participant. Well, not of course. I'll take your word  
10 for it that you weren't a participant.

11 MR. KENNEY: We knew this was going on.

12 THE COURT: These questions I think would be  
13 apparent to anyone looking at this record. And the  
14 fact that you didn't represent your client before  
15 November 17<sup>th</sup> doesn't mean you're unable to ask her  
16 about what happened before November 17<sup>th</sup>. But  
17 apparently you have not done so and maybe there's some  
18 reason not to have done so. But in any event, if this  
19 continues to be a controversy that I have to resolve,  
20 there are questions I need to have answered because the  
21 most readily apparent and most plausible explanation is  
22 one that suggests a different motive for the motion  
23 than you proffered to the motion to vacate and one that  
24 would, as you conceded, justify an award of fees for  
25 litigating the motion and all of the succeeding

1 appearances.

2           That said, I do have some concerns on the  
3 other side about the amount of fees. We're in the  
4 Eastern District, not the Southern District, and  
5 whatever the wisdom of the Second Circuit's decision in  
6 Simmons saying that you have to look at Eastern  
7 District fees in such circumstances, that is the law of  
8 the circuit. So I'm not prepared to sign off on the  
9 very high fees that I know you can demand in the  
10 Southern District. I don't doubt the veracity of that.

11           I'm wondering if it would make sense to take  
12 a break while you folks discuss two things, only one of  
13 which necessarily would be pertinent. One is whether  
14 you can agree on a compromise that resolves this  
15 entirely, the amount to be awarded. Secondly, if you  
16 can't, to come up with dates for a factual hearing to  
17 resolve the questions that -- the factual questions  
18 that I've discussed. Do you want to take a break to do  
19 that now or do you want to confer with each other and  
20 write back to me in a week or so? What do you guys  
21 think?

22           MR. MALIONEK: I would be happy to have  
23 those discussions over the phone and get right back to  
24 your Honor. I think that might be the most efficient.

25           THE COURT: Okay.

1                   MR. MALIONEK: But we of course will follow  
2 your lead.

3                   Mr. Kenney, I'm sorry if you have a  
4 different thought.

5                   MR. KENNEY: I'd be more than happy to talk  
6 about it right now and get back to you in a few  
7 minutes, if your Honor has the time.

8                   THE COURT: Why don't we take a break and  
9 see if you can resolve something quickly. If not, I  
10 don't want to put time pressure on it. I want to have  
11 considered decisions, so don't feel any pressure from  
12 my end to do it that way. If you both feel that you  
13 can, by all means, I'll certainly wait a few minutes.

14                   MR. MALIONEK: Your Honor, I apologize.  
15 While we're happy to talk about it right now, it will  
16 take some time to be able to then discuss it with our  
17 client. I do actually respectfully think it may make  
18 sense to get back to the Court a week from now. I  
19 don't want to preclude us discussing it right now. We  
20 absolutely will.

21                   THE COURT: Right. You're saying you can't  
22 reach an agreement because you need to run it your  
23 client.

24                   MR. MALIONEK: Right.

25                   THE COURT: That's understandable. I'd

1 understand that on either side. So why don't I expect  
2 a letter from you a week from today, and either you'll  
3 tell me it's resolved or what other possibility there  
4 is short of resolution before we go ahead and schedule  
5 a hearing. If you guys think you haven't resolved it  
6 but it's not out of reach, im happy to have -- I  
7 wouldn't want to be personally involved in trying to  
8 sponsor settlement negotiations on it because in the  
9 absence of an agreement, I'd have to come up with a  
10 number myself. But I could refer you to court-  
11 sponsored mediation or another magistrate if that's  
12 something you all agree on.

13 So let me know your preference and we'll  
14 take it from there.

15 MR. MALIONEK: Thank you, your Honor.

16 THE COURT: Thank you all. Have a very good  
17 day.

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18 I certify that the foregoing is a correct  
19 transcript from the electronic sound recording of the  
20 proceedings in the above-entitled matter.  
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25 ELIZABETH BARRON

January 19, 2017